NO. 47929-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHANNE THOMAS McKITTRICK and
ERIC MICHAEL ELLISER,
APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 13-1-04907-6 and 13-1-04905-0

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where skinhead-related evidence was probative of motive, intent, premeditation, and the absence of self defense, did the trial court abuse its discretion when it ruled that the evidence could be admitted with a number of limitations and restrictions?

2. Where eye witness, forensic, and video evidence established that the defendants chased down Mr. Wagner, cornered him two on one and stabbed him to death while sustaining no injury themselves nor demonstrating any fear of injury from Mr. Wagner, in light of the sufficiency standards, was there sufficient evidence?

3. Where there was credible or conflicting evidence from which a jury could have found that the defendants provoked the need to act in self defense, did the trial court abuse its discretion by giving a provocation jury instruction?

4. Where all of the stab wounds were inflicted in the same area, in a small number of minutes, and for a single motivating purpose, was jury unanimity assured by a continuing course of conduct without a unanimity instruction?

B. STATEMENT OF THE CASE.

1. Procedural History.

On December 20, 2013, appellants Eric Michael Elliser and Shanne Thomas McKittrick were charged with two counts of second degree murder and one count of conspiracy to commit second degree murder for the November 17, 2013, stabbing death of Mr. Wagner. CP Elliser 1-3[1]. CP McKittrick 1-3. Originally five defendants were charged and prosecuted jointly as co-defendants. *Id.* However, by the time of trial two had pled guilty, namely Mellissa Bourgault and Jeffrey Cooke, leaving three as trial co-defendants. Mr. Cooke pled guilty under a plea agreement that called for him to testify against his former co-defendants. RP 3/18, pp. 62-64(Cooke). RP 3/24, p. 37(Cooke). The two appellants and a third defendant, Mark Stredicke, were tried jointly to a jury. The two appellants were convicted, Mr. Stredicke was acquitted.

The original charges were amended on January 27, 2015. The charges at trial against Mr. McKittrick were first degree, premeditated murder and second degree felony murder predicated on assault. CP McKittrick 12-13. The charges against Mr. Elliser were second degree

[1] The record in this case includes clerk's papers designated in both of the defendants' cases and verbatim reports from the joint pre-trial and trial proceedings. Clerk's papers will be cited by page number and with an indication of which defendant's case they are from. The verbatim reports are not consecutively paginated. Thus it will be necessary to cite to the date of the proceeding and page number. A parenthetical will also be included to identify witnesses.

felony murder predicated on assault, and first degree assault. CP Elliser 64-65.

Trial commenced on March 2, 2015, with several days of pre-trial motions. RP 3/2, p.4. The motions included issues to which error is assigned in these appeals, as well as a multitude of other issues that are not being challenged. In particular the pretrial motions included a thoroughly briefed and argued CrR 3.6 suppression motion related to skinhead community or culture evidence. *See* CP McKittrick 20-30, 14-19. CP Elliser 50-55, 66-81, 122-134, 171-172. RP 2/23, p. 4, *et. seq.* RP 3/2, p. 20, *et. seq.* RP 3/3, p. 4, *et. seq.* RP 4/13, 123 *et. seq.* RP 4/14, p. 5 *et. seq.*

The trial court's final ruling on the skinhead evidence motion was not issued until nearly the end of the state's case. RP 4/14, pp. 5-18. At that time the court ruled by "narrowing the scope" of what would be admitted and permitting only evidence that it deemed of "probative value to show the reason for the acrimony, perhaps the reason for the upset, the question of loyalty, the question of disrespect may have lent itself, at least to the initial confrontation between the individuals, to be distinguished from what ultimately happened." RP 4/14, p.7. Thereafter the state presented testimony from an expert in the person of William Riley of the Department of Corrections Threat Security Group who testified about skinhead community norms. RP 4/14, p. 19, *et. seq.* (Riley).

The state called a total of 29 witnesses, including Mr. Riley, with the testimony stretching over five weeks. RP 3/11, p. 17(Koethe). RP 4/15, p. 15(Reopelle). The witnesses included two eye witnesses who were present at the scene when the stabbing occurred. *See* 3/17, p. 6, *et. seq.* (Wright) and RP 3/18, p. 56, *et. seq.* (Cooke). The state also introduced cell phone location evidence, text message and voice communication evidence, video surveillance evidence as well as the usual homicide investigation evidence, including forensic photographic and laboratory evidence. CP Elliser 216-231. The trial exhibits included, video images of the scene of the murder at the time of the murder [RP 4/14, 156, *et. seq.* (Reopelle).], and the timing and content of text message and some voice communications among the three defendants. RP 3/25, p.56-61 (Nasworthy). RP 3/26, p.106 *et. seq.* (Nasworthy). Exhibits 259, 260, 261 and 268.

Mr. Elliser presented a defense case. His witnesses include an expert who sought to enhance the video footage [RP 4/16, p. 30 (Tinker).] and Mr. Elliser's girlfriend (who is also Mr. McKittrick's sister), Michelle McKittrick [RP 4/16, p. 113 (Michelle McKittrick).]. The defense case concluded and all of the defendants rested on April 20, 2015. RP 4/20, p. 3.

Closing arguments took place during two days starting on April 21, 2015. RP 4/21, p. 20. On April 28, 2015, the jury returned guilty verdicts for Mr. McKittrick for lesser included manslaughter first degree and

second degree murder. CP McKittrick 227-241. The jury also convicted Mr. Elliser of second degree murder and first degree assault. CP Elliser 409-421. Mr. McKittrick was sentenced only for the second degree murder; the manslaughter was vacated and dismissed. CP McKittrick 32. Mr. Elliser was likewise sentenced only for the murder; the assault was vacated and dismissed. CP Elliser 414.

2. Statement of Facts.

The events leading to the stabbing of Mr. Wagner at 45th and Asotin in Tacoma began with his having traveled from his home in Kalama to Yelm to visit a prison friend, Josh Loper. RP 3/11, p. 18-20, 35-37 (Koethe). While Mr. Wagner was in Yelm, Mr. Cooke drove out from Tacoma to meet with him. RP 3/18, p. 65-70 (Cooke). The purpose of Mr. Cooke's trip was in part to discuss skinhead business related to a particular skinhead who was accusing another of committing crimes in his name. *Id.* Mr. Cooke had a second purpose for the trip as well. He needed to arrange for Mr. Wagner to meet with and talk to Mr. Elliser about an alleged affair that Mr. Wagner had with Mark Stredicke's wife, Erin Cochran. RP 3/18, p. 71-74 (Cooke). Mr. Cooke knew about the affair from Mr. Stredicke; they'd had a conversation about it shortly before the murder. RP 3/18, p.74 (Cooke).

After having dinner in Yelm, Mr. Cooke and Mr. Wagner drove to Tacoma. 3/18, p.76-78 (Cooke). Upon arrival at Mr. Cooke's house (and

after Mr. Wright's disabled car was towed to the house) Mr. Wagner had a short face-to-face conversation with Mr. Elliser. RP 3/18, p. 78 (Cooke). There was no apparent animosity between the two men and Mr. Elliser soon departed. *Id.* Thereafter Mr. Cooke, Mr. Wagner, and Mr. Wright had dinner and drank at Mr. Cooke's house. At that time, some five hours before the stabbing, Mr. Wagner was described by Mr. Wright as significantly intoxicated, in that he was "swerving when he was walking and slurring words." RP 3/17, p. 18 (Wright).

It should be noted that much of the testimony concerning the events before, during and after the stabbing, was provided by Mr. Cooke and Mr. Wright. However their testimony was corroborated or supported by evidence gathered during the police investigation. That evidence included the following: (1) cell phone call detail records and cell tower location records [*See* CP Elliser 216-231. *See also* Testimony related to Exhibits 119-151A, 215-222A, 227-237.]; (2) Facebook communication records for Mr. Stredicke and Ms. Cochran [CP Elliser 216-231, Testimony related to Exhibits 246-250, 258.]; and (3) private surveillance video footage showing the scene of the stabbing, the residence where Mr. Wagner's body was found, and Mr. Cooke's residence; the footage captured images of all involved before, during and after the stabbing, and the next day [CP Elliser 216-231, Testimony related to Exhibits 238-242.]. In addition because the call detail and text records were extraordinarily voluminous, the trial court admitted summaries showing the sequence and

content of the most significant communications between the parties in timeline format. Exhibits 259, 260, and 261. Also admitted into evidence was a DVD Power Point containing mapping of the cell phone location evidence. Exhibit 268. In short the jury had before it a wealth of information against which it could compare the truthfulness and accuracy of the insider, eyewitness testimony of Mr. Cooke, Mr. Wright and other minor witnesses.

The dinner at Mr. Cooke's house was followed by a skinhead house party at Mr. Elliser's house. RP 3/17, 16-23 (Wright). RP 3/18, pp. 81-84 (Cooke). While at the party, Mr. McKittrick repeatedly became upset about Mr. Wagner's presence after phone conversations with Mr. Stredicke. RP 3/18, pp. 85-90 (Cooke). There was also an incident involving a potential "boot party"-like punishment for a skinhead who was not involved in the stabbing, Danny Harvester. RP 3/17, p. 24 (Wright). RP 3/18, p. 91-92 (Cooke). Mr. Harvester was to be disciplined by Mr. Cooke because he had allegedly violated skinhead norms by using methamphetamine. *Id.*

As the evening wore on there was an increase in the tension concerning Mr. Wagner's transgression with a "comrade's wife." RP 3/18, p. 88-94 (Cooke). The tension led to Mr. Cooke, Mr. Wagner, and Mr. Wright leaving at the insistence of Mr. Elliser's girlfriend (Mr. McKittrick's sister), Michelle McKittrick. 3/17, p. 27-28 (Wright). RP 3/18, p.112-17 (Cooke). As they were leaving there was a near fight, a

bumping of chests between Mr. Cooke, Mr. Wagner, and Mr. McKittrick. RP 3/17, p. 27-28 (Wright). RP 3/18, p. 112-121 (Cooke). This was during or immediately after an approximate nine minute angry phone call from Mr. Stredicke to Mr. McKittrick in which he apparently complained about Mr. Cooke and the other skinheads socializing with the skinhead who had an affair with his wife. Exhibit 259. RP 3/18, pp. 114-22 (Cooke). No blows were exchanged, no weapons were brandished and no one sustained any injury during the near-fight. *Id.*

The nine minute phone call was not the only communication with Mr. Stredicke. The phone and text message evidence included the following:

- Starting at 12:34 am (that is approximately 45 minutes before the stabbing) a series of eight text messages are exchanged between Mr. McKittrick's cell phone and Mr. Stredicke's cell phone culminating in the following exchange:
    - 00:37 – "Pyres!" (from Mr. McKittrick to Mr. Stredicke)
    - 00:37 – "Yes!" (from Mr. McKittrick to Mr. Stredicke)
    - 00:58 – Tell ol one eye [Mr. Cooke] to invite the dude to his house and break bread with the motherf__er too. I'm sure dude will hold his marriage just as sacred as mine." (from Mr. Stredicke to Mr. McKittrick)
    - 00:59 –"Oi!" (from Mr. McKittrick to Mr. Stredicke)
- The text messages were followed by a nine minute phone call from Mr. McKittrick's cell phone to Mr. Stredicke's cell phone. That phone call would have terminated just ten minutes before the stabbing.

Exhibit 259.

The near fight indicated the depth of the animosity felt toward Mr. Wagner. Under the circumstances there was a great deal of potential for violence and injury. The violence did not materialize while the parties were at Mr. Elliser's house. Mr. Cooke squared off with Mr. McKittrick in defense of Mr. Wagner but wisely took the precaution of disarming himself of the sheath knife that he habitually carried. RP 3/18, p. 118-123 (Cooke). Mr. McKittrick and Mr. Elliser also customarily carried knives but at that time did not display them. RP 3/17, pp. 31-33 (Wright). RP 3/18, p. 101-04 (Cooke). RP 4/16, p. 155-57 (Michelle McKittrick). Mr. Wagner picked up Mr. Cooke's knife (Mr. Wright thought that he already had the knife after the aborted boot party for Mr. Harvester [RP 3/17, p. 29-30 (Wright).]), still in its sheath, prompting Mr. McKittrick, his girlfriend and sister to yell at Mr. Wagner. RP 3/18, p. 27-30 (Cooke). RP 4/16, p, 136-141 (Michelle McKittrick). Mr. Wagner responded by calling the women derogatory names immediately before leaving the scene with Mr. Cooke. RP 3/17, pp. 27-28 (Wright). RP 3/18, p. 118-121 (Cooke).

As Mr. Wagner was leaving to go back to Mr. Cooke's house, Mr. McKittrick chased him down. RP 3/17, p. 34-37 (Wright). RP 3/18, p. 6-8 (Cooke). By recklessly driving up behind Mr. Cooke's car he conveyed to them that he wanted to fight Mr. Wagner. *Id.* Mr. Wagner got out of Mr. Cooke's car to meet Mr. McKittrick, taking with him Mr. Cooke's knife which he tucked into a back pocket or behind his back. RP 3/17, pp.

32-37 (Wright). RP 3/19, p. 9-11 (Cooke). Mr. Wright described Mr. Wagner as possibly having had a road beer in his hand at the time but otherwise agreed with Mr. Cooke that he did not have the knife in his hand. RP 3/17, p. 37 (Wright). RP 3/19, p. 9-11 (Cooke). A beer can was found at the scene and admitted into evidence. Exhibit 3.

According to Mr. Cooke the two men circled each other until Mr. Elliser arrived. RP 3/19, p.12-21 (Cooke). Mr. Elliser joined in and at that point, when Mr. Wagner was outnumbered two to one and boxed in against a hedge, the stabbing of Mr. Wagner occurred. *Id.* Just before receiving the first stab wound, Mr. Wagner called out to Mr. Elliser to "get your boy." RP 3/19, p. 12 (Cooke). Then he called to Mr. Cooke for help. RP 3/19, p. 18-21 (Cooke). He then fled on foot. *Id.* RP 3/17, p. 37-42 (Wright). Although neither Mr. Cooke nor Mr. Wright saw either of the men with a knife in their hands, Mr. McKittrick may have verbally referenced seeing the knife, at least according to the trial testimony of Mr. Wright. RP 3/17, p. 44 (Wright). However Mr. Wright was impeached on that point with his police statement which did not include the alleged statement from Mr. McKittrick about having seen a knife. RP 3/17, p. 108-09, 190 (Wright). Mr. Wright acknowledged that the police statement was more accurate. RP 3/17, p. 77 (Wright).

Neither Mr. Cooke nor Mr. Wright saw Mr. Wagner alive after he ran off. As for the two defendants, immediately after the stabbing Mr. Cooke described himself as "dumbfounded" when Mr. McKittrick "gets

up real close and says, One Eye, I stuck him, kind of gives me a little nudge." RP 3/19, p. 19 (Cooke). In Mr. Elliser's case, in his police statement, Mr. Wright described Mr. Elliser statements immediately afterward as follows:

> A. Well, it's just like -- it's like I'm saying it either sounds like he wanted to go finish him off, you know, so they wouldn't get in trouble or he wanted to go find him to make sure he was all right so they wouldn't get in trouble, you know, either one. You know, he's just pissed off, sounded like he wanted to go finish him off.
>
> Q The detective asked, Okay, 'cause there's a difference between those two, don't you think?
>
> A It was like, oh, fuck where's he at, I got to go find him or I got to go kill him. I don't know, he didn't say either one. But, you know, he wanted to find him bad. . .

RP 3/17, p. 186 (Wright). For his part Mr. Cooke testified that Mr. Elliser said, "things got out of hand, it wasn't supposed to go like that." RP 3/19, p. 23 (Cooke). In any event, immediately after the stabbing neither defendant said anything about having been in danger of being stabbed by Mr. Wagner nor about having stabbed him in self defense. Statements to that effect were brought up only during meetings between the defendants in the days following the stabbing, according to Mr. Cooke. RP 3/23, pp. 110-18 (Cooke). RP 3/24, pp. 43-46 (Cooke).

What was not known to Mr. Cooke or Mr. Wright was that Mr. Wagner had been mortally wounded. His body was found in a backyard at

the corner of 46th and Asotin, which is one block south from the scene of the stabbing. RP 3/11, p. 89 (Mimura). The homeowner at that location found Mr. Wagner's body nearly concealed from view in his back yard. RP 3/11, p. 90-92 (Mimura). In addition the homeowner noticed that the top bar of the chain link fence next to the gate was bent but the gate was also ajar. *Id.* Mr. Wagner's body appeared to have been rolled over; he was found face up with three stab wounds in his chest but with a large blood stain next to his body according to the lead detective. RP 04/14, p. 117-122 (Reopelle).

The medical examiner's investigation provided details as to the stabbing and the deadly effect of the three stab wounds. The medical examiner testified that the cause of death was multiple stab wounds. RP 3/26, p. 81 (Clark). In particular Mr. Wagner had suffered three deep stab wounds to the chest. RP 3/26, p. 50-65 (Clark). Of the three stab wounds, one described as stab wound number two, was inflicted later in time compared to the first and at a time when Mr. Wagner no longer had significant blood pressure. RP 3/25, pp.166-73 (Clark). That stab wound had to have been inflicted a "small number of minutes" [RP 3/25, p. 167 (Clark). RP 3/26, p. 67 (Clark).] after stab wound one and/or three because enough time had to have lapsed for Mr. Wagner's blood pressure to drop to nonexistence. RP 3/26, p. 50-65 (Clark).

The jury in this case had an additional most significant item of evidence. A neighbor in the area maintained a video surveillance system

that continuously silently recorded the events before, during and after the stabbing and the next day. RP 3/12, pp.94-97 (Rowe). RP 4/14, p. 156-59 (Reopelle). The video shows the stabbing but not with sufficient detail that the identities of the participants (as distinguished from their vehicles), or their actions can be differentiated. CP Elliser 216-231, Exhibit 239. The stabbing appears on the video at the approximate time stamp of 2:20 a.m. and lasts to between 2:23 to 2:24 a.m. *Id.* The video also shows Mr. Elliser's vehicle, a station wagon, coming from the direction of where Mr. Wagner's body was found approximately three minutes after the stabbing. RP 4/14, p. 167-68 (Reopelle). No other vehicle is seen coming from that area.

Closing arguments were completed on April 22, 2015. The verdicts were returned on April 28, 2015. RP 4/28, p. 27. Sentencing was held on August 21, 2015. RP 8/21, p. 62, *et. seq.* Mr. McKittrick was given a high-end, standard range sentence totaling 299 months. CP McKittrick 227-241. Mr. Elliser was sentenced as a persistent offender to life in prison. CP 409-421. These appeals were timely filed the day of the sentencing hearings. CP McKittrick 244. CP Elliser 423.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING SKINHEAD-RELATED EVIDENCE BECAUSE THE EVIDENCE WAS PROBATIVE OF MOTIVE (AND THEREFORE INTENT AND PREMEDITATION) AND THE ABSENCE OF SELF DEFENSE, AND FURTHERMORE WAS NOT UNFAIRLY PREJUDICIAL IN LIGHT OF THE TRIAL COURT'S REASONABLE LIMITATIONS.

The trial court in this case spent a considerable amount of time both during pretrial hearings and outside the presence of the jury during the trial crafting a final ruling concerning skinhead community evidence. *See* RP 2/23, p. 4, *et. seq.* RP 3/2, p. 20, *et. seq.* RP 3/3, p. 4, *et. seq.* RP 4/13, 123 *et. seq.* RP 4/14, p. 5 *et. seq.* The court also had the advantage of extensive briefing and offers of proof via live testimony from the primary witnesses. *See* RP 2/23, p. 4, *et. seq.* (Riley), and RP 3/3, p. 4, *et. seq.* (Cooke). CP Elliser 50-55, 66-81, 122-134, and 171-172. CP McKittrick 20-30 and 14-19. Because skinheads are closely tied to white supremacist prison gangs the court's cautious and considered ruling necessarily applied the propensity rule, ER 404(b), to the specific issues and evidence in this case.

The propensity rule is a general rule of exclusion with a number of enumerated and case law-based exceptions. The rule specifically provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

It has been observed that ER 404(b) is not intended to deprive the State of relevant evidence that may be necessary to establish an element of the crime or crimes charged. ***State v. Mee,*** 168 Wn. App. 144, 154, 275 P.3d 1192, *review denied,* 175 Wn.2d 1011, 287 P.3d 594 (2012), quoting ***State v. Foxhoven***, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) and ***State v. Lough***, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Rather, the rule prevents the State from introducing evidence and argument that the defendant is guilty because he or she may have had a propensity or proclivity to commit the crime. *Id.* ***State v. McCreven***, 170 Wn. App. 444, 458, 284 P.3d 793, 800 (2012) citing ***State v. Everybodytalksabout,*** 145 Wn.2d 456, 466, 39 P.3d 294 (2002). ER 404(b) rulings are reviewed for an abuse of discretion. ***State v. Embry,*** 171 Wn. App. 714, 732, 287 P.3d 648 (2012), *review denied,* 177 Wn.2d 1005, 300 P.3d 416 (2013).

The standard of review is thus whether the trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* at 731–32.

Trial courts have admitted gang-related evidence under the propensity rule for a variety of legitimate purposes. These include as proof of identity, motive, intent, res gestae, or that the defendants were acting as accomplices. ***State v. McCreven***, 170 Wn. App. at 461 ("As to the Hidalgos evidence, however, the trial court did not err. It conducted the required ER 404(b) analysis and properly admitted that evidence to prove [identity]".) Unlike this case, in some cases specific evidence of gang membership such as gang monikers and the specific names of gang sets are referred to directly by a witness. It has been said of such evidence that there is no requirement that trial courts "edit eyewitness testimony in a way that will sanitize the event being described." ***State v. Filitaula***, 184 Wn. App. 819, 825, 339 P.3d 221, 224 (2014), *review denied*, 184 Wn.2d 1020, 361 P.3d 747 (2015) (Gang-related evidence properly admitted "to show 'the taunting back and forth' that preceded the assault and supplied a motive for it."), ***State v. Yarbrough***, 151 Wn. App. 66, 86, 210 P.3d 1029, 1039 (2009) ("[G]ang-related evidence was highly probative to establish the inducing cause for [the defendant] to assault another with a deadly

weapon . . . ."), ***State v. Boot***, 89 Wn. App. 780, 790, 950 P .2d 964 (1998) and ***State v. Campbell***, 78 Wn. App. 813, 822–23, 901 P .2d 1050 (1995).

In this case the trial court admitted gang-related evidence, including testimony from the State's expert, in part as proof of motive for the stabbing. It applied the reasoning from the ***Embry*** case where this Court held:

> The present matter is analogous to *Yarbrough,* as there we held that the trial court properly admitted gang evidence under ER 404(b) to show the defendant's mental state and intent to commit the crime charged. Here the State presented evidence of the defendants' gang affiliation, the victim's affiliation with a different gang, and a previous altercation between members of the victim's and defendants' gangs. As in *Yarbrough,* the trial court here found that the gang evidence was probative in proving the elements of the charged crime. Finding no manifest abuse of discretion such that no reasonable trial court would have ruled as the trial court did, we affirm the trial court's ER 404(b) ruling.

State v. Embry, 171 Wn. App. 714, 736, 287 P.3d 648 (2012).

This case was different than ***Embry*** in one important respect and the trial court's carefully crafted ruling took that difference into account. For obvious reasons the court sanitized the racist, white supremacist aspects of the skinhead evidence. *See* RP 4/13, pp. 124 *et.seq.* Thus what was put before the jury was akin to sociology evidence concerning a community, described by the court as "a close collegial, fraternal relationship" but with a hypersensitivity to respect, loyalty, the sanctity of

marriage, and esteem for female affiliates, wives, and girlfriends. RP 4/13, p. 125. In light of Mr. Wagner's transgression with Mr. Stredicke's wife and his deplorable behavior toward Mr. McKittrick's sister and girlfriend, the evidence was highly probative of the motive for the knife attack. The sanitizing avoided even a minimal risk of unfair prejudice.

Immediately before the state's skinhead expert took the stand, the trial court finalized its ruling. RP 4/14, p. 5. After having revisited the issue in at least five separate pre-trial and trial hearings, and after having heard the bulk of the evidence in the state's case, the court had the advantage of context and issued its last ruling:

> And so, within the rubric and the language of Evidence Rule 404(b), I think that becomes the purpose for which it's being offered. And I tried very hard to, in my comments of yesterday, to make it clear that I'm, you know, narrowing the scope of that and that I won't belabor yesterday's comments, other than, I went into, I'd like to think, some length of what this case is not about. . . .
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> * * * *
>
> I do find that probative value to show the reason for the acrimony, perhaps the reason for the upset, the question of loyalty, the question of disrespect may have lent itself, at least to the initial confrontation between the individuals, to be distinguished from what ultimately happened. Yes, it is prejudicial, but it's also highly probative as to -- well, I shouldn't say, highly – it is probative to what impacted, what set the stage, if you will, for what ultimately happened. And the point being that it may have set the stage for it, but, ultimately, when you juxtapose self-defense defense, it may have set the stage for the

confrontation, but, ultimately, the act itself could still be a matter of self-defense.

RP 4/14, pp. 7-8.

To argue that no rational trial judge would have made the same ruling is unpersuasive. As was so frequently pointed out by the defendants, infidelity with another man's wife is understandable to a jury. What is not understandable is how an affair with a woman who at the time was separated from defendant Stredicke, plus derogatory words directed at other women in the defendants' presence, could cause such a loss of face for the defendants as to lead to a stabbing. But as Jeffry Cooke explained it:

Q Why is betrayal of trust and loyalty a concern to anyone other than the people involved?

A Because in our situation as skinheads, you pledge your loyalty and respect and your honor to each other. If you do it, you would disrespect one in that nature, who's to say you won't disrespect another.

Q In the eyes of the skinhead community, how does the person who is wronged in that relationship viewed as a result?

A If they don't do anything about it, generally, like they just let some -- kind of like they're weak, but they just let the disrespect happen.

Q Why is weakness a concern?

A Because our whole situation as skinheads, we're supposed to be the vanguard, soldiers, so to speak,

of our situation, our social standing, and, you know, no soldier wants to look weak.

Q Now, likewise, the person who commits the offense or has the affair, how is that person viewed?

A Well, they broke their word, or, you know, I can't really trust him around my old lady or my wife, whatever, just like that. But that's pretty much how it is, like they can't be trusted generally.

RP 3/19, pp. 70-71 (Cooke).

It is well-established that before gang-related evidence may be admitted, the trial court should apply the following analysis: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the intended purpose for the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) determine whether the probative value outweighs the prejudicial effect. ***State v. Yarbrough***, 151 Wn. App. at 82. Such a ruling is reviewed for abuse of discretion. *Id.* at 81. ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Under that standard an appellate court should reverse the ruling only if it has "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached." ***United States v. Schlette***, 842 F.2d 1574, 1577(9th Cir. 1988).

The defense arguments concerning abuse of discretion are inconsistent with the record and not well taken. Mr. Elliser asserts that "skinhead affiliations and practices . . . was not necessary . . . ." Brief of Appellant, p. 27. In fact the trial court as part of its ruling excluded

evidence of affiliation and practices related to white supremacist or racist ideology. *See* RP 4/13, pp. 124 *et.seq.* It allowed only evidence directly related to the violence actually perpetrated against Mr. Wagner. In light of having struck such a careful balance, the trial court can hardly be deemed to have "committed a clear error of judgment in the conclusion it reached." *Id.*

Defendant McKittrick suggests that the evidence related to motive was improperly admitted under ***Wingate***. Brief of Appellant, p.35. *See* ***State v. Wingate,*** 155 Wn.2d 817, 822-23, 122 P.3d 908 (2005). While it is true that ***Wingate*** concerned marital infidelity, it is not accurate to view it as a propensity evidence case. The case dealt instead with an aggressor instruction issue, and incidentally approved of the instruction under circumstances quite similar to ours. *Id.* at 823.

The skinhead community in this case had unique cultural norms that impacted how the defendants viewed Mr. Wagner. The probative value of the expert testimony is exemplified by the defendants' use of it. During cross examination of the state's defense expert, the defense explored the issue of disrespect because an argument could be made that it undermined the state's motive evidence:

> Q. If an individual is disrespected, isn't it typical that that individual would take care of the disrespect issue?
>
> A. It kind of goes two different ways. The individual would be expected to take care of his own business.

> If he didn't take care of his business, the group – you know, he could be incapacitated somehow. He may not be in an area where he could take care of his business. His group may opt to have someone take care of his business for him. He could opt to have someone take care of his business for him, or the group could take care of his business for him as well, it just depends on the availability of the two individuals.

RP 4/14, p. 50-51 (Riley).

Issues of skinhead culture were an inescapable part of the trial. Starting with the reason for Mr. Wagner having come to Tacoma in the first place, namely to explain himself, not to Stredicke but to Mr. Elliser [RP 3/18, pp.71-74 (Cooke). RP 3/23, 59-60 (Cooke).], and ending with Mr. Elliser telling Cooke that "it shouldn't have went that far" [RP 3/19, p.23 (Cooke). RP 3/23, p. 105 (Cooke).], the actions of the defendants can only be understood in light of knowledge of the community to which they and the victim alike were part of. It would be difficult for an uninformed juror to make sense of this killing over an affair with a woman who was separated from her husband, who lived across the state from him and who had a promiscuous reputation. RP 3/18, pp.61-73 (Cooke). But where the affair caused a rift in the (not unfairly prejudicial) values of loyalty, honor, trust, respect and disrespect shared by the defendants the motive for the killing is much more comprehensible. It cannot be said that the trial court was irrational for so-ruling.

2. IN LIGHT OF THE SUFFICIENCY STANDARD, THE EVIDENCE WAS MORE THAN SUFFICIENT TO (1) NEGATE SELF DEFENSE, (2) PROVE THE ELEMENTS OF SECOND DEGREE FELONY MURDER, AND (3) PROVE ACCOMPLICE LIABILITY, WHERE EYE WITNESS AND VIDEO EVIDENCE ESTABLISHED THAT THE DEFENDANTS CHASED DOWN DEREK WAGNER, CORNERED HIM TWO ON ONE AND STABBED HIM TO DEATH, ALL WHILE SUSTAINING NO INJURY AND NEITHER VERBALIZING NOR DISPLAYING ANY FEAR OF ATTACK.

The standard for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Green***, 94 Wn.2d 216, 616 P.2d 628 (1980)(emphasis supplied), quoting ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), ***State v. Theroff***, 95 Wn.2d 385, 388, 622 P.2d 1240, 1243 (1980), ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Stated another way, the standard means that if two or more rational fact finders could differ but at least one of them would have found sufficient evidence, the conviction should be upheld; it is only when no rational trier of fact could have convicted that a claim of insufficiency should be sustained. ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

The sufficiency standard also requires that a court apply several presumptions concerning the evidence. First, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Because a reviewing court may not "determine witness credibility, reweigh the evidence, or supplant [its] judgment for that of the jury," it follows that conflicts among the witnesses are to be resolved in the State's favor and consistent with the jury's verdict. ***State v. McCreven***, 170 Wn. App. 444, 481, 284 P.3d 793 (2012) ("The evidence was sufficient to prove that [the defendant] was not acting in self-defense."). *See also* ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated in part on other grounds by* ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), ***State v. Liden***, 138 Wn. App. 110, 117, 156 P.3d 259 (2007), and ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), ***State v. Liden***, 138 Wn. App. at 117.

a. Viewing the evidence in the light most favorable to the state there was more than sufficient evidence for a jury to conclude that the state had disproved self defense and had proved the elements of felony murder beyond a reasonable doubt.

In a case involving violence, injury, or death alleged to have been justified as self defense, sufficiency necessarily involves analysis of the self defense burden of proof. In a self defense case the defense bears the initial burden of providing evidence of self-defense. ***State v. Walden***, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Once the defendant produces some evidence of self-defense, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *Id.*, ***State v. Bolar***, 118 Wn. App. 490, 509, 78 P.3d 1012 (2003), citing ***State v. Salinas***, 119 Wn.2d at 201.

Self defense standard is defined by statute and includes three essential elements: Force may be used in self defense when (1) it is "used by a party about to be injured, or by another lawfully aiding him . . .;" (2) "in preventing or attempting to prevent an offense against his or her person;" and (3) "in case the force is not more than is necessary." RCW 9A.16.020(3). In this case, at the urging of the defendants and consistent with ***McCreven***, the trial court gave the jury a self defense instruction patterned on WPIC 17.02 and this statute. CP Elliser 277, CP McKittrick 362, Instruction 41. Because each of the foregoing elements are

necessary, it follows that self defense is successfully disproved if any one of the three elements is negated. *Id.*

The evidence in this case was more than sufficient to negate at least one element of self defense. Before discussing the evidence, it should be noted that the defendants have submitted discussion and analysis of sufficiency related to charges that were vacated and dismissed. In Mr. Elliser's case, the first degree assault was vacated and dismissed, and in Mr. McKittrick's case the manslaughter was likewise vacated and dismissed. In light of those dismissals there is no reason to discuss sufficiency of the evidence for those charges. Any issue related to sufficiency as to those charges is moot. ***State v. Deskins***, 180 Wn.2d 68, 80, 322 P.3d 780(2014), citing ***Klickitat County Citizens Against Imported Waste v. Klickitat County***, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993). "An issue is moot if it is not possible for this court to provide effective relief." *Id.* This Court cannot provided relief because it cannot reverse a conviction for a charge that has already been vacated and dismissed.

Turning to the felony murder charges, there is more than sufficient evidence that Mr. Wagner was assaulted and murdered rather than killed lawfully in self defense. In the first place it was undisputed that Mr. Wagner was stabbed three times in the chest and that at least one of the

stab wounds was inflicted by Mr. McKittrick and the others were inflicted either by Mr. McKittrick or Mr. Elliser. RP 3/17, pp. 72-76 (Wright). RP 3/19, pp 18-23 (Cooke). RP 3/25, pp. 161-69 (Clark). There was no testimony that either Mr. McKittrick or Mr. Elliser sustained any injury. In light of Mr. Wagner's extraordinary state of intoxication [RP3/26, p. 79 (Clark).], the location where the stabbing occurred (a confined area where he was cornered up against a large hedge), it was more than reasonable for the jury to infer and conclude from the evidence that two defendants who were not significantly intoxicated cornered a stumbling drunk against whom they had deep animosity and stabbed him to death. *Id.* RP 3/17, p. 16 (Wright). RP 3/19, pp. 14-21 (Cooke). These facts alone belie any claim of lawful self defense. There is no evidence the defendants were "about to be injured." RCW 9A.16.020(3).

The defendants' arguments dwell on the undisputed fact that Mr. Wagner had possession of Cooke's sheathed knife at the time he was stabbed to death. RP 3/17, 37-42 (Wright). Although Mr. Wagner had the knife, the direct evidence, that is the observations from Mr. Wright and Cooke, were that he had tucked it out of sight in a back pocket or in the back of his pants. RP 3/17, p. 32-33, 37, 102-108 (Wright). RP 3/19, pp. 9-11 (Cooke). Furthermore, consistent with his post-mortem BAC, he was described as having been intoxicated in the extreme. RP 03/17, p.16

(Wright). RP 03/18, p. 81-84 (Cooke). In that state although he had a knife on his person, it was in a sheath with a difficult to manipulate clasp and Mr. Wagner, according to Mr. Wright, also had a beer in his hand. RP 3/17, 32-37 (Wright). RP 3/18, p. 123 (Cooke). A rational juror would have been remiss not to infer that Mr. Wagner's state of intoxication and accompanying lack of dexterity caused him to be physically incapable of posing a threat of injury to the less intoxicated, knife armed defendants even though he had possession of the knife. After all he was outnumbered in addition to drunk.

Since self defense would have required that the force (that is plunging a large knife or knives into Mr. Wagner's inebriated chest three times) used by the defendants have been "not more than is necessary," and since the defendants must have been "about to be injured," and since they must not have been the aggressors, the jury's decision cannot be said to have been irrational. CP Elliser 277, 247. CP McKittrick 362,368, Instructions 41-47. It was the correct decision in light of all that was apparent to the defendants at the time of the stabbing no matter whether Mr. Wagner had possession of a knife or not.

It would be a mistake to consider possession of a knife as a reason to overturn the jury's verdict in this case. Knife or not the overwhelming weight of all of the evidence in this case supports the view that this was a

retaliatory stabbing that got out of hand. Mr. Elliser admitted as much immediately after the stabbing to Cooke when he said that the stabbing got "out of hand" and that it "wasn't suppose to go down like that." RP 03/19, p.23 (Cooke). The rest of the direct and circumstantial evidence supports the reasonableness of the jury's decision and contradicts any claim that the jury was irrational. According to the testimony of Mr. Wright and Mr. Cooke, together with reasonable inferences from their testimony, the evidence established the following facts:

- Mr. Wagner was the target of animosity from both defendants as a result of having had sexual relations with a "comrade's" (Mr. Stredicke's) wife [RP 3/18, 88-89 (Cooke)];
- Infidelity was considered a "big betrayal of trust and loyalty" in the skinhead community to which the defendants belonged because it was a show of disrespect by Mr. Wagner and conveyed weakness on the part of the defendants [RP 3/19, p. 70-71 (Cooke).];
- Wagner threw accelerant on the already smoldering animosity by disrespecting the defendants' girlfriends (Mr. Elliser's girlfriend was also Mr. McKittrick's sister) in their presence [RP 3/18, p. 112-21 (Cooke).];
- Wagner was targeted and baited at the party concerning the affair but he left the party with Cooke after bumping chests with Mr. McKittrick but without having inflicted or seriously threatened injury on anyone and without having threatened anyone with a weapon [RP 3/17/2015, pp. 27-28 (Wright); RP 3/18/2015, pp. 112-21 (Cooke).];
- Having left the party in peace, Mr. Wagner and Mr. Cooke were *en route* to retire for the night at Cooke's house when Mr. McKittrick chased them down in an aggressively driven car and thereby signaled that he wished to engage in hand to hand violence against Wagner[*Id.*, RP 3/19/2015, p. 6-8 (Cooke)];
- Wagner got out of the car and circled with Mr. McKittrick with his hands up, without fighting him and without a knife but was

eventually cornered against a large hedge when Mr. Elliser arrived and joined in [RP 3/19, p. 9-14 (Cooke).];

- At the moment of the stabbing both Mr. McKittrick and Mr. Elliser bore personal enmity toward Wagner; Mr. McKittrick for the disrespect of Stredicke, his girlfriend and his sister, and Mr. Elliser for Wagner having allegedly lied to him about the affair with Stredicke's wife [RP 3/18, p. 112-21, RP 3/19, p. 12 (Cooke).];
- Just before the stabbing, Wagner called upon Mr. Elliser to break it up but Mr. Elliser's response was to join Mr. McKittrick thereby causing Wagner to be outnumbered [RP 3/19, p. 12-14.];
- At the moment of the stabbing Wagner was cornered by two knife-armed men [RP 3/18, p. 101-04.];
- At the moment of the stabbing Wagner called for help whereas Mr. McKittrick acknowledged that Wagner had Cooke's knife but never called out for help or moved away from Wagner consistent with having any fear of the knife [RP 3/19, p.12-23 (Cooke).];
- With at least one knife wound in his chest, Wagner fled from the defendants on foot having inflicted no injury on either of them and with his pericardium rapidly filling with blood and causing his blood pressure to plummet [RP 3/19, p. 18-21 (Cooke). RP 03/25, p.161-66 (Clark). RP 3/26, pp. 62-66 (Clark).]
- In the heat of the moment spontaneously at the scene neither defendant said anything about Wagner having attacked either of them with a knife or without [RP 3/19 p. 18-21 (Cooke).];
- That night, during subsequent contacts with the defendants nothing was said about Mr. Wagner having attacked either of the defendants with a knife much less that he had posed such a threat to them that they were compelled to stab him three times in the chest. [RP 3/19, p. 18-21 (Cooke).];
- According to Mr. Wright's police statement (which he testified was more accurate than his testimony [RP 3/17, p.77 (Wright)]), Mr. Elliser remained in the area looking for Wagner to "finish him off" [3/17, p. 180-86 (Wright).];
- According to Mr. Wright's police statement he didn't even know there had been a stabbing until Mr. McKittrick came to Cooke's house several hours afterward and said that he had stabbed Wagner and that he needed to buy Cooke's truck as a getaway vehicle [RP 3/17, 72-76 (Wright).].

The foregoing discussion sets aside the issue of provocation.

Without even considering provocation, there is more than sufficient evidence to disprove self defense. Neither defendant said or did anything consistent with having been in a knife fight with Wagner. Neither of them said or did anything from which a jury should have inferred that the three stab wounds were reasonable because the defendants were "about to be injured" or that the stabbing was necessary because "no reasonably effective alternative" was evident and that "the amount of force used was reasonable to effect the lawful purpose intended." CP Elliser 277, 283, CP McKittrick 362, 368, Instructions 41 and 47. Had there been anything in Wagner's action that justified three deep stab wounds to the chest, that is had there been any threat to the lives of the defendants that would have made the deadly force "not more than is necessary," the defendants surely would have said as much to Cooke and Mr. Wright in the heat of the moment. They didn't and the absence of any statements or behavior consistent with a life-threatening experience supports the rationality of the jury's verdict.

b. Considering the wealth of evidence establishing that the defendants by intentional acts created their own necessity of using armed violence, it cannot be said that no rational trier of fact would have found as this jury found.

Provocation, of course should not be set aside in the final analysis. It contributes an additional reason to conclude that the stabbing was not

lawful self defense. It is undisputed that Mr. McKittrick chased Mr. Wagner down and engaged him in a standoff followed by a fight and stabbing. Having done so, it was more than reasonable for the jury to conclude that by an "intentional act reasonably likely to provoke a belligerent response" Mr. McKittrick first and Mr. Elliser later assisting, unlawfully created "a necessity for acting in self defense." CP Elliser 282, CP McKittrick 367, Instruction 46. While it may be said that Mr. Wagner would have been wise to stay in the car, he did nothing wrong or illegal by getting out. He was not the aggressor or challenger, he was being challenged by an aggressor. It was perfectly rational for the jury to conclude that the subsequent lethal force was not lawful because any necessity for it was created by the defendants themselves.

The right to use force in self defense does not imply a right to retaliate or exact revenge. ***State v. Janes***, 121 Wn.2d 220, 850 P.2d 495 (1993), citing ***United States v. Peterson***, 483 F.2d 1222, 1229 (DC. Cir.), *cert. denied*, 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed 2d 244 (1973). "No matter how sound the justification, revenge can never serve as an excuse for murder. '[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge.'" *Id.* at 237, quoting ***People v. Dillon***, 24 Ill.2d 122, 125, 180 N.E.2d 503 (1962).

There can be no doubt that Mr. McKittrick went after Mr. Wagner not the other way around. This is not permissible under the guise of self defense. ***State v. Studd***, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999), ***State***

v. Bolar, 118 Wn. App. 490, 507, 78 P.3d 1012, 1021 (2003). ***Bolar*** is similar to this case in that the defendant searched out the victim. The defendant shot the victim dead because "he needed to kill [the victim] before [the victim] killed him." *Id.* at 506. The court observed, "By his own theory of self-defense, [the defendant] went searching for Hill, located him, and attacked in the first instance. Moreover, the evidence is very strong that he acted in retaliation and revenge for the theft of his property and the loss of his girlfriend to a rival." *Id.* at 507.

The defendants may offer a circular argument and claim that Mr. Wagner was actually the provocateur because he got out of the car after having been chased down. This is not consistent with the evidence. In the first place Mr. Cooke, Mr. Wagner, and Wright departed Mr. Elliser's residence intending to return to Cooke's house. RP 3/17, pp 27-28 (Wright). RP 3/18, pp. 120-25 (Cooke). RP 3/19, p. 6 (Cooke). It was Mr. McKittrick who went after Wagner not the other way around. Secondly, while Wagner did get out of Cooke's car to meet Mr. McKittrick after Mr. McKittrick drove up on him, the entire reason for Mr. McKittrick's provocation was retaliation or revenge for Wagner's disrespect of Stredicke and his disrespect for Mr. McKittrick's girlfriend and sister.

To view this case as lawful self defense on the part of the defendants when it was they who chased down Wagner would be to remove the necessity justification of self defense. Were actions such as

the defendants took in this case to be considered lawful, a knowledgeable defendant would only need to pursue a target until he turns at bay. Then that response could become a legal justification for the use of force even to the extent of deadly force. Under such circumstances self defense would then be divorced from necessity and would provide an unwarranted justification for murder. This of course would be contrary any heretofore recognized view of lawful self defense.

c. Where the defendants admit the truth of the state's evidence and all reasonable inferences that can be drawn from it, the evidence is more than sufficient to prove that the defendants acted as principals, accomplices or both.

In Washington a person may be found guilty of a crime committed by another person if he "actually knew that he was promoting or facilitating" the other person in the commission of the crime." RCW 9A.08.020(3). ***State v. Allen***, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). "[T]he accomplice liability statute establishes a *mens rea* requirement of 'knowledge' of 'the crime.'" ***State v. Roberts***, 142 Wn.2d 471, 510, 14 P.3d 713 (2000), ***State v. Cronin***, 142 Wn.2d 568, 579, 14 P.3d 752, 757 (2000) ("[T]he statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged.").

The accomplice instructions in this case were a correct statement of this legal standard and there has been no assignment of error that claims otherwise. It is well settled that an "accomplice need not 'have specific knowledge of every element of the crime nor share the same mental state as the principal.'" ***State v. Whitaker***, 133 Wn. App. 199, 230, 135 P.3d 923 (2006), quoting ***State v. Berube***, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003), ***Sarausad v. State***, 109 Wn. App. 824, 836, 39 P.3d 308, 315 (2001) ("[W]e conclude that the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder.").

The accomplice statute and the jury instructions in this case required that an accomplice "(i) Solicits, commands, encourages, or requests such other person to commit [the crime]; or (ii) Aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3), CP Elliser 246, CP McKittrick 331, Instruction 10. Furthermore aiding or agreeing to aid requires no more than "all assistance whether given by words, acts, encouragement, support, or presence" and also that one "who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime." *Id.*

It should also be noted that the jury instructions did not require unanimity concerning whether either of the defendants was the principal or the accomplice or both. This too was proper. In so-called split elements cases, a conviction may be affirmed "[s]o long as the State proved beyond a reasonable doubt to the satisfaction of all of the jurors that at least one of the participants [had the requisite intent] and at least one but not necessarily that same participant [committed the criminal act]." ***State v. Walker***, 182 Wn.2d 463, 341 P.3d 976, 987 (2015), quoting ***State v. Haack***, 88 Wn. App. 423, 429, 958 P.2d 1001(1998), ***In re Personal Restraint of Hegney***, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007) (A "jury is not required to determine which participant acted as a principal and which participant acted as an accomplice . . . The jury need only conclude unanimously that both the principal and accomplice participated in the crime."), citing ***State v. Hoffman***, 116 Wn.2d 51, 104–05, 804 P.2d 577 (1991).

Defendant Ellsier's argument concerning accomplice liability focuses on the medical examiner's testimony to the exclusion of all of the rest of the evidence. From the combination of (1) the video evidence showing Mr. Elliser's car coming from the area of the Mimura backyard immediately after the stabbing [Exhibit 239. RP 4/14, pp. 165-75 (Reopelle).] (2) the testimony of the two eyewitnesses, Mr. Cooke and Mr.

Wright, both of whom stated that Mr. Wagner fled immediately after having been stabbed the first time [RP 3/17, p. 38-42, 72-76 (Wright). RP 3/19, p. 18-21, 35. RP 3/23, p.60-70 (Cooke).], and (3) coupled with the medical fact that Mr. Wagner's blood pressure had dropped significantly between the time of stab wounds two and one and/or three (and to near zero for number two) [RP 3/26, p. 59-64 (Clark).], it was more than reasonable for the jury as a whole, or any particular juror individually, to conclude that Mr. Wagner could have been stabbed while incapacitated in the Mimura backyard. After all, as testified repeatedly by the medical examiner, "a small number of minutes" had to have elapsed between the stab wounds because Mr. Wagner's blood pressure had to drop before stab wound number two was inflicted. *Id.* There was not enough time at the fight scene for that to have happened. Mr. Wagner, according to all the evidence fled immediately after having been stabbed the first time.

The presence of Mr. Elliser's vehicle, shown on the video coming from the area of the Mimura house after "a small number of minutes" [*See* RP 4/14, p. 167-68 (Reopelle).] *after* the initial stabbing is powerful evidence of his direct involvement. Exhibit 239, at video time stamps 2:26:13 *et. seq.* and 2:28:38 *et. seq.* From the video the jury had direct, video evidence that Mr. Elliser was coming from where Mr. Wagner's body was found and therefore at the very least had the opportunity to

inflict one or two of the three stab wounds. Plus he certainly had motive to do Wagner harm and expressed as much when he yelled at Wagner that Wagner had lied to him. Viewed in the light most favorable to the State, the reasonable inference that Mr. Elliser was a direct participant in the stabbings was supported by substantial evidence.

It is important to emphasize that an accomplice need not personally commit the crime. In a two-person assault that results in death, the "jury need only conclude unanimously that both the principal and accomplice participated in the crime." ***In re Hegney***, 138 Wn. App. at 524, ***State v. Walker***, 182 Wn.2d at 483. In this case Mr. McKittrick argues that the jury could have inferred that Mr. Elliser personally inflicted the fatal stab wound or wounds whereas he inflicted a non-fatal wound. Brief of Appellant McKittrick, pp. 20-23. That argument is supported by substantial evidence but so too is a rational inference that Mr. McKittrick stabbed Mr. Wagner first. The unreasonable aspect of Mr. McKittrick's argument is that stabbing a man in the chest is not sufficient evidence of participation in a stabbing death where the cause of death was "multiple stab wounds." RP 3/26, p. 81 (Clark).

Whether or not one or the other of the defendants personally inflicted one or more of the stab wounds, both are guilty as accomplices in what was actually a two-person attack. Cornering Wagner against the

hedge at the corner of 45th and Asotin with knowledge was sufficient even if Mr. Elliser never unsheathed his own knife and instead left the scene without going to the Mimura house. However much the video evidence belies that possibility, in a sufficiency accomplice case, where the jury need not be unanimous as to whether one or the other of the defendants was the principal or the accomplice, it is sufficient that Mr. Wagner was killed by multiple stab wounds inflicted by one or the other or both of the defendants.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GIVING A PROVOCATION INSTRUCTION WHERE THERE WAS CREDIBLE EVIDENCE FROM WHICH A JURY COULD DETERMINE THAT THE DEFENDANTS PROVOKED THE NEED TO ACT IN SELF DEFENSE, EVEN IF THE EVIDENCE COULD BE DESCRIBED AS CONFLICTING.

In general, the trial court's choice of jury instructions is reviewed for an abuse of discretion. ***State v. Green***, 182 Wn. App.133, 152, 328 P.3d 988 (2014). However, alleged errors of law are reviewed de novo. ***State v. Fehr***, 185 Wn. App. 505, 514, 341 P.3d 363, 368 (2015). Adequacy of the instructions and alleged errors is not reviewed in isolation but in the context of "the jury instructions as a whole." ***State v. Davis***, 174 Wn. App. 623, 638, 300 P.3d 465, 472, *review denied*, 178 Wn.2d 1012, 311 P.3d 26 (2013).

Appropriateness of a trial court's jury instructions depends in part on the particular issues and evidence in a case. Jury instructions "are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." ***State v. Fehr***, 185 Wn. App. at 514, quoting ***State v. Barnes***, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005), ***State v. McCreven***, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) ("Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law."), citing ***State v. Knutz***, 161 Wn. App. 395, 403, 253 P.3d 437 (2011) and ***State v. Aguirre***, 168 Wn.2d 350, 363–64, 229 P.3d 669 (2010). Proposed instructions may be given when supported by substantial evidence. ***State v. Saunders***, 177 Wn. App. 259, 270, 311 P.3d 601, 606 (2013), *review denied*, 180 Wn.2d 1015, 327 P.3d 55 (2014), quoting ***State v. Clausing***, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

Jury instructions concerning self defense are evaluated according to the same standards. ***State v. McCreven***, 170 Wn. App. at 462. In particular, to be "entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable

doubt." *Id.* Citing ***State v. Walden,*** 131 Wn.2d 469, 473–74, 932 P.2d 1237 (1997), ***State v. Janes,*** 121 Wn.2d 220, 237, 850 P.2d 495 (1993) and ***State v. Acosta,*** 101 Wn.2d 612, 619, 683 P.2d 1069 (1984).

In Washington it is a defense to murder if a homicide was justified because it was committed in lawful self defense. RCW 9A.16.050(1). In addition in an assault case, or in case of a felony murder predicated on an assault, self defense is also a defense, but under a different standard. RCW 9A.16.020(3). In this case the jury was instructed concerning the elements of self defense that applied to the three distinct charges and the unique circumstances and evidence in this case. CP Elliser 276, 277. CP McKittrick 361, 362. The defendants not only have not alleged error to that aspect of the instructions but they also proposed versions of the self defense instructions that were ultimately given. CP Elliser 340, 341. CP McKittrick 57, 80, 81.

It should be noted in response to Mr. McKittrick's argument about his closing argument, that self defense is not evaluated from a wholly subjective perspective. ***State v. Walden***, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) ("The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done."), citing ***State v. Janes,*** 121 Wn.2d 220, 238,

850 P.2d 495 (1993). To argue as the defendant attempted to argue that "you have to put yourself in his shoes," is an incomplete description of the jury instructions and of lawful self defense. RP 4/22, pp.23-24. Accordingly the State's timely objection to the incomplete and therefor inaccurate argument was correctly sustained. *Id.*

The trial court's self defense instructions were the product of considerable colloquy and argument during instruction conferences occupying several court days. *See* RP 4/17/2015, p. 3 *et. seq.* and RP 4/20/2015, p.12 *et.seq.* In addition to giving the self defense elements instructions, the trial court also gave a number of instructions that refined or elaborated on various aspects of self defense. Like the elements instructions these were also taken verbatim or derived from pattern instructions. They included (1) the definitions of bodily harm and great personal injury related to the degree of harm or danger that might necessitate self defense [CP Elliser278, 281. CP McKittrick 363, 366. Instructions 42 and 45.]; (2) the right to act on appearances. [CP Elliser 279. CP McKittrick 364. Instruction 43.]; (3) the right to stand one's ground [CP Elliser 280. CP McKittrick 365. Instruction 44.]; and (4) the degree of necessity that justifies deadly or non-deadly force [CP Elliser 283. CP McKittrick 368. Instruction 47.]. *See* WPIC No.s 2.03, 2.04.01, 16.07, 17.04, and 16.08. The defendants proposed versions of some of these instructions and have not assigned error to the trial court giving any of them. CP Elliser 296-368. CP McKittrick 36-71, 79-81.

Having not assigned error to the giving of two separate self defense standards and to a number of instructions that refined or elaborated on the law of self defense, the defendants single out the provocation instruction. *See* CP Elliser 282. CP McKittrick 367. But provocation was properly included. Just as the self defense elements instructions did not address the right to act on appearances, or the right to stand one's ground, or bodily injury, or great personal injury, or necessity, they also did not address provocation.

In self defense cases provocation means that one may not use lawfully use force when one created the need for the use of force in the first place. ***State v. Wingate***, 155 Wn.2d 817, 122 P.3d 908 (2005), ***State v. Riley***, 137 Wn.2d 904, 976 P.2d 624 (1998), ***State v. Davis***, 119 Wn.2d 657, 835 P.2d 1039 (1993), ***State v. Dennison***, 115 Wn.2d 609, 801 P.2d 193 (1990), and ***State v. Craig***, 82 Wn.2d 777, 514 P.2d 151 (1973). This principle is set forth in WPIC 16.04, and was presented to the jury in this case by Instruction 46. CP Elliser 282. CP McKittrick 367.

Whether or not there was sufficient evidence to justify a provocation instruction is a question of law, and is therefore reviewed *de novo*. ***State v. Anderson***, 144 Wn. App. 85, 89, 180 P.3d 885, 887 (2008), citing ***State v. J–R Distribs., Inc.***, 82 Wn.2d 584, 590, 512 P.2d 1049 (1973). Where a provocation instruction is proffered by the State, the State need only have produced "some evidence that [the defendant] was the aggressor to meet its burden of production." *Id.* at 89, citing ***State v.***

Riley, 137 Wn.2d 904, 909–10, 976 P.2d 624 (1999), and ***State v. Hughes***, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

A provocation instruction is appropriate where "there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. . . ." ***State v. Riley***, 137 Wn.2d at 909, citing ***State v. Hughes***, 106 Wn.2d 176, 191–92, 721 P.2d 902 (1986) and ***State v. Kidd***, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). It is also appropriate "if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." ***State v. Riley***, 137 Wn.2d at 910, citing ***State v. Davis***, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992).

Provocation is a common sense doctrine. It elaborates on the right to use force in lawful self defense as well as the right to stand one's ground in that "the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action." ***State v. Riley***, 137 Wn.2d. at 910, citing ***State v. Craig***, 82 Wn.2d 777, 783, 514 P.2d 151 (1973).

The Supreme Court has relied upon the reasoning from a leading criminal law treatise concerning the rationale for provocation, namely that self-defense is generally not available to an aggressor because "'the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be

unlawful force, for self-defense.'" 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7, at 657-58 (1986), quoted in ***State v. Riley***, 137 Wn.2d at 911. The ***Riley*** court also noted that "[f]or the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm." *Id.* at 912.

In this case there was a wealth of evidence that the defendants were not in imminent danger of harm and that they provoked the stabbing. Setting aside for the moment that the defendants' motivation involved retaliation, it is all but undisputed that Mr. Cooke, Mr. Wagner, and Mr. Wright left the skinhead gathering at Mr. Elliser's house without having engaged in any actual violence. RP 3/17, 27-28 (Wright). They were headed back to Mr. Cooke's house. RP 3/18, p. 88-90, 112-17 (Cooke). They left the defendants behind at Mr. Elliser's house and there is no evidence that they expected any further contact that night. It was first Mr. McKittrick and then Mr. Elliser who chased after them. RP 3/19, p. 6-8 (Cooke).

Mr. McKittrick signaled in unmistakable terms that he wished to call out Mr. Wagner. *Id.* He did not withdraw from the prior confrontation, he escalated it. He did not remain at Mr. Elliser's house, he went chasing after Wagner. He all but forced Cooke to pull over. RP 3/17, 34-37 (Wright). RP 3/19, pp. 6-11 (Cooke). Having successfully done all of that, and with Mr. Elliser subsequently arriving to help corner

Wagner against a hedge, he stabbed Wagner in the chest with a knife. RP 3/19, pp.14-21 (Cooke).

There is no evidence that having chased after and called out or challenged Mr. Wagner that either defendant withdrew. Quite to the contrary, they finished what they set out to do, ultimately with three rapidly fatal stab wounds to Mr. Wagner's chest. RP 3/25, pp.64-68 (Clark). According to the ***Riley*** court, the defendants were bound to withdraw "from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action." ***State v. Riley***, 137 Wn.2d. at 910, citing ***State v. Craig***, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). They did the opposite and thus their actions fell squarely within provocation.

Had the jury not received a complete description of the law of self defense, the jury would have been left to speculate about the impact of the defendants' aggressive actions. Provocation is not a question solely of motive but of action. ***State v. Wingate***, 155 Wn.2d 817, 122 P.3d 908 (2005). In ***Wingate*** the court reviewed a shooting homicide arising from an alleged affair between the victim and the defendant's former girlfriend. The defendant initiated the fatal confrontation by going to the victim's house with several friends. The trial court gave a provocation instruction. The court of appeals reversed the conviction on the ground that provocation would not apply if the defendant was not engaged in "wrongful or unlawful conduct." *Id.* at 821.

The Supreme Court reversed. *Id.* at 822-23. The Court stated, "[T]he Court of Appeals' approach is contrary to the directive of ***Riley*** that '[a]n aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight'" *Id.* at 822 (emphasis in the original). Furthermore the ***Wingate*** court stated that "in light of the presence of evidence of the defendant's 'aggressive conduct' -- that is, the defendant drawing his gun first and aiming it at another person—the giving of an aggressor instruction was proper." *Id.* at 823.

Wingate is similar to this case in at least two respects. First, the evidence in this case is not limited to motive any more than was the evidence in ***Wingate***. Both cases involve an incident in which there could be said to be moral fault on both sides. In ***Wingate*** the defendant precipitated an armed confrontation about an alleged affair. In this case the confrontation was about an affair between Mr. Wagner and the wife of the defendants' compatriot, Mark Stredicke. RP 3/17, p. 27-28 (Wright). RP 3/18, pp.81-90, 118-121 (Cooke). But it was also about Mr. McKittrick having lost face in front of his girlfriend when Mr. Wagner referred to her using a demeaning vulgarity. *Id.* In the eyes of the defendants Mr. Wagner compounded the disrespect that he had displayed by having an affair with Mr. Stredicke's wife by calling Mellissa Bourgault a vulgar anatomical name and by engaging in provocative behavior at Michelle McKittrick's home. RP 3/18, p. 121-22 (Cooke). RP 3/19, pp. 171-82 (Cooke). In light of the norms observed by the

defendants as skinheads, it was no accident that an armed Mr. McKittrick chased down a very drunk Mr. Wagner, engaged him in a knife fight and stabbed him to death. RP 3/19, pp. 6-11, 14-21 (Cooke).

A second similarity between this case and ***Wingate*** is the mixed nature of the evidence. This case was about violence between two armed men prompted by skinhead-fueled disrespect. It was undisputed that both Mr. McKittrick and Mr. Wagner were armed with knives. RP 3/17, p.32-33 (Wright). RP 3/18, pp. 93-105 (Cooke). Mr. McKittrick knew without a doubt that Mr. Wagner was the last person to have had possession of Mr. Cooke's K-bar sheath knife. RP 3/18, pp. 121-124 (Cooke). He chased him down anyway and in the space of a few minutes fatally stabbed him with his own knife. RP 3/19, pp. 6-19 (Cooke). He surely had the advantage of Wagner in a knife fight due to Wagner's extreme intoxication. RP 03/17, p.16, 37 (Wright). RP 3/26, p. 79 (Clark). These circumstances are just as messy insofar as the law of self defense is concerned as those in ***Wingate*** where the defendant likewise went to the victim's location and provoked a fatal confrontation. ***State v. Wingate***, 155 Wn.2d at 823. It would have been impossible for the jury to judge the lawfulness of the defendants' use of force without a complete description of the legal standards that applied to it.

A provocation instruction is not a question of equity. The instruction was given in ***Wingate***, not because the victim was blameless. It was given because there was evidence that the defendant had provoked

the fatal confrontation. Likewise in ***Riley*** the victim was not without fault; he was an alleged gang member who had been selling drugs and guns in the defendant's neighborhood, and who, according to the defendant, threatened to shoot the defendant. ***State v. Riley***, 137 Wn.2d 904, 906, 976 P.2d 624 (1999). The provocation instruction was nevertheless appropriate in both cases because there was (1) "credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense," (2) "credible evidence that the defendant made the first move by drawing a weapon," and (3) "conflicting evidence as to whether the defendant's conduct precipitated a fight." *Id.* at 909-10 (citation omitted).

Just as the jury required a definition of great personal injury in order to determine whether the risk posed to the defendants could justify the killing of Mr. Wagner, it also required an explanation of the legal significance of the defendants' aggressive actions. It would be difficult to quantify whether provocation is a common or uncommon issue in self defense cases, or whether courts commonly or sparingly give the instruction. Despite its use of the term "sparing" in footnotes, the Supreme Court has not abandoned provocation as a limitation on justifiable homicide. *See* ***State v. Riley***, 137 Wn.2d at 910, footnote 2, citing, ***State v. Arthur***, 42 Wn. App. 120, 125, 708 P.2d 1230 (1985), footnote 1. And with good reason. It would invite an escalation of violence in our community were it to be lawful for a knife-armed

defendant to call out a drunk and then kill him merely because the drunk had possession of a knife himself. Where a case involves provocateurs who kill and then claim that the killing was justifiable, the jury must be given the full legal standard if it is to deliberate on a proper verdict.

A further reason supporting the provocation instruction is that self defense is based "in necessity and generally ends with the cessation of the exigent circumstance which gave rise to the defensive act." ***State v. Janes***, 121 Wn.2d 220, 237, 850 P.2d 495 (1993), citing ***United States v. Peterson***, 483 F.2d 1222, 1229 (DC. Cir.), *cert. denied*, 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed 2d 244 (1973). Necessity implicates both the subjective and objective aspects of self defense: "The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." ***State v. Janes***, 121 Wn.2d at 238, citing ***State v. Allery***, 101 Wn.2d 591, 594, 682 P.2d 312 (1984).

The right to use deadly force in self defense does not imply a right to retaliate. ***State v. Janes***, 121 Wn.2d at 240. Insofar as revenge or retaliation are concerned, the court in ***Janes*** stated, "The objective aspect also keeps self-defense firmly rooted in the narrow concept of necessity. No matter how sound the justification, revenge can never serve as an excuse for murder. '[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or

revenge.'" *Id.*, quoting ***People v. Dillon***, 24 Ill.2d 122, 125, 180 N.E.2d 503 (1962).

Where the facts in a particular case call for it, a retaliation and revenge instruction is appropriate in order to apprise the jury of another important limitation on the right to use deadly force. ***State v. Studd***, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). While ***Janes*** was a self defense case that dealt primarily with admissibility of battered child syndrome evidence, its discussion of retaliation and revenge was reaffirmed in regard to jury instructions in ***Studd***.

In ***Studd*** the court reviewed six consolidated self defense appeals that challenged a specific defect in a since-replaced version of the pattern jury instruction, WPIC 16.02. ***State v. Studd***, 137 Wn.2d at 545-46. One of the cases was a Pierce County second degree murder case in which a retaliation and revenge instruction was proposed and given. The Supreme Court upheld giving of the instruction saying, "We find that the instruction correctly stated the law, and did not unfairly emphasize the State's theory of the case or, in any way, comment upon the evidence." ***State v. Studd***, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). The Pierce County defendant's conviction was upheld. *Id.*

This case did not include a retaliation and revenge instruction. Nevertheless the emphasis on necessity in ***Janes*** and ***Studd*** is persuasive in support of the provocation instruction. In both retaliation and revenge and in provocation the jury should not be left to speculate about the impact

of the defendant seeking out the victim. ***State v. Bolar***, 118 Wn. App. 490, 507, 78 P.3d 1012, 1021 (2003). ***Bolar*** arose from a self defense case in which the defendant searched for the victim for a week and shot him dead because "he needed to kill [the victim] before [the victim] killed him." *Id.* at 506. The court observed, "By his own theory of self-defense, [the defendant] went searching for Hill, located him, and attacked in the first instance. Moreover, the evidence is very strong that he acted in retaliation and revenge for the theft of his property and the loss of his girlfriend to a rival." *Id.* at 507.

If provocation followed by a killing were to be considered lawful, many situations that should be resolved without violence would be much more likely to escalate into fatalities. Provoking or causing a fight is easily accomplished. To pick a fight and then use overwhelming force is straight out a bully's playbook. One can always claim the need to defend one's self from the natural consequences of a fight even if one started the fight. But just as it is unfair for a bully to use a fight as an excuse to beat up his victim, so too it is unlawful to provoke a victim, kill him, and then rely of self defense. The jury in this case was correctly not left to speculate on lawfulness or fairness, the provocation instruction informed them of the applicable standard to be applied under the law. In giving the instruction the trial court committed no error.

4. JURY UNANIMITY WAS ASSURED WITHOUT A UNANIMITY INSTRUCTION WHERE THE STABBING OF DEREK WAGNER SERVED A SINGLE MOTIVATING PURPOSE AND WHERE ALL OF THE STAB WOUNDS WERE INFLICTED IN THE SAME AREA WITHIN A SMALL NUMBER OF MINUTES.

Conviction by a unanimous jury includes a requirement that a unanimous jury find that the act charged as a crime in the information was committed by the person charged. ***State v. Petrich***, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Where a single criminal offense is based on evidence of multiple separate and distinct acts, any one of which could form the basis of the count charged, the court must either instruct the jury to agree unanimously on a specific criminal act, or the prosecutor must elect which act the State relies on for the conviction. *Id.* at 572.

There is a distinction between multiple act cases and cases involving a continuing course of conduct. ***State v. Crane***, 116 Wn.2d 315, 325-30, 804 P.2d 10 (1991). A continuing course of conduct may form the basis of a single charge and requires neither a unanimity instruction nor an election by the State. *Id.* at 326. In such cases jury unanimity is assured when the jury unanimously agrees that the defendant engaged in the course of conduct constituting the crime. *Id.*

A continuing course of conduct reflects the reality that not all crimes are susceptible of being committed by a single exertion or effort. "A continuing course of conduct requires an ongoing enterprise with a

single objective. . . Common sense must be utilized to determine whether multiple acts constitute a continuing course of conduct." ***State v. Love***, 80 Wn. App. 357, 361, 908 P.2d 395 (1996), citing ***State v. Gooden***, 51 Wn. App. 615, 619–20, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988) and ***State v. Handran***, 113 Wn.2d 11, 17, 775 P.2d 453(1989).

Multiple acts committed during a short period of time for a single purpose are generally considered a continuing course of conduct. ***State v. Love***, 80 Wn. App. at 362. In ***Love***, the acts were acts of possession of separate and distinct quantities of crack cocaine in separate locations. While it may be said that the defendant had engaged in multiple acts, all of the acts "reflect his single objective to make money by trafficking cocaine; thus, both instances of possession constituted a continuous course of conduct." *Id.*

The same holds true in multiple acts of assault. In the ***Crane*** case the continuing conduct consisted of multiple assaults resulting in the death of a three year old child during a two hour period of time. ***State v. Crane***, 116 Wn.2d 315, 325-30. Consistent with ***Crane,*** this Court viewed a series of threatening communications not as individual instances of harassment but of a continuing course of harassment. ***State v. Locke***, 175 Wn. App. 779, 803, 307 P.3d 771 (2013). "Furthermore, all three communications served the same objective of communicating, at the very least, [the defendant's] desire that the Governor or her family be harmed

or killed. Accordingly, the facts here demonstrate a continuous course of conduct, and no multiple acts unanimity instruction was required." *Id.*

In this case, the testimony of Mr. Cooke and Mr. Wright as to the location, timing, and circumstances of the stabbing was supplemented by medical testimony and video evidence. In terms of where and when the stab wounds were inflicted the evidence supported either (1) that all three stab wounds were inflicted in the space of two minutes at the corner of 45th and Asotin, or (2) that one or at most two of the stab wounds were inflicted at that corner, and rest were inflicted in the backyard of the Mimura house. Because the motive for all three stab wounds was the same, namely retribution for the affair with Stredicke's wife and for the disrespect directed at Mr. McKittrick's girlfriend and sister, the precise location that the knife or knives were plunged into Mr. Wagner's chest is inconsequential insofar as a unanimous verdict was concerned.

This case is not similar to ***Petrich*** where distinct sexual assaults were perpetrated on different days, at different times and in different locations. It is comparable to ***Crane*** and ***Locke*** because the purpose of all three stab wounds was the same and because the stabbings happened at the same time and place. There was no need for a unanimity instruction. Such an instruction could only have confused the jury as to its duty to

apply the accomplice instruction and the instructions related to self defense.

An additional reason for rejecting the defendants' arguments concerning unanimity is that they did not propose a unanimity instruction. CP Elliser 296-368. CP McKittrick 36-71, 79-81, and 413-485. RAP 2.5(a)(3) permits a party to raise an issue for the first time on appeal when the issue involves "manifest error affecting a constitutional right." While failure to provide a required unanimity instruction could satisfy the constitutional right part of this standard, the failure to raise the issue in the trial court is manifest only when it had "practical and identifiable consequences" at trial. ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011), quoting ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

An added unanimity complication in an accomplice case is that there is no requirement of unanimity concerning accomplice liability. ***State v. Hoffman***, 116 Wn.2d 51, 104, 804 P.2d 577, 605 (1991). "In ***Hoffman*** the Supreme Court held, "We addressed this issue in ***State v. Carothers***, 84 Wn.2d 256, 525 P.2d 731 (1974) and concluded that it is not necessary that jurors be unanimous as to the manner of an accomplice's and a principal's participation as long as all agree that they did participate in the crime." *Id. See also* ***State v. Walker***, 182 Wn.2d

463, 484, 341 P.3d 976 (2015) ("The Court of Appeals correctly concluded that the jury needs to unanimously find only that both the principal and accomplice participated in the crime; it need not unanimously conclude as to the manner of participation.") and ***In re Hegney***, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007) ("The jury need only conclude unanimously that both the principal and accomplice participated in the crime.").

There can be little argument in this case that only one defendant participated in the stabbing. The evidence supports either that all three stabbings happened at the corner of 45th and Asotin, or that one or more happened within minutes in the backyard of the Mimura house. Since Mr. Cooke's testimony, corroborated as it was by the video evidence, establishes that both defendants were in close proximity to Mr. Wagner and had him cornered against the hedge at the time he sustained his first stab wound, there was substantial evidence to establish that both participated in the stabbing. RP 3/19, pp. 14-23 (Cooke). The medical evidence cannot differentiate Mr. Wagner's exact location was when he sustained the three stab wounds. RP 3/26, p. 54-61, 63-67 (Clark). Considering that both of the defendants were armed with knives and that both were directly involved in cornering Mr. Wagner against the hedge when he was first stabbed, it follows that both were participants in his

stabbing no matter which of them personally inflicted any of the three stab wounds.

To require more unanimity would be to require something that the accomplice statue, the Supreme Court and this Court have not required. Namely, such a requirement would mean that there must be unanimity as to the manner of each defendant's participation. In the ***Walker*** case the defendant was not present at the scene but was nevertheless a fully invested participant in the robbery murder plot. "It does not matter in this case that [the co-defendant gunman], not [the defendant], performed the actual shooting given [the defendant's] level of involvement and participation." ***State v. Walker***, 182 Wn.2d at 484. Likewise in this case there was no requirement that the jury differentiate whether Mr. McKittrick or Mr. Elliser inflicted stab wound one, two, or three, or all of them or none of them. Each of the defendants' undisputed participation is sufficient for unanimity purposes. A separate unanimity instruction could only have served to mislead the jury as to accomplice liability on these facts.

D. CONCLUSION.

For the foregoing reasons the state urges this Court to affirm the defendants' convictions and sentences.

DATED: Friday, November 18, 2016

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WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/18/16 Theresa Kan
Date Signature

PIERCE COUNTY PROSECUTOR

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